

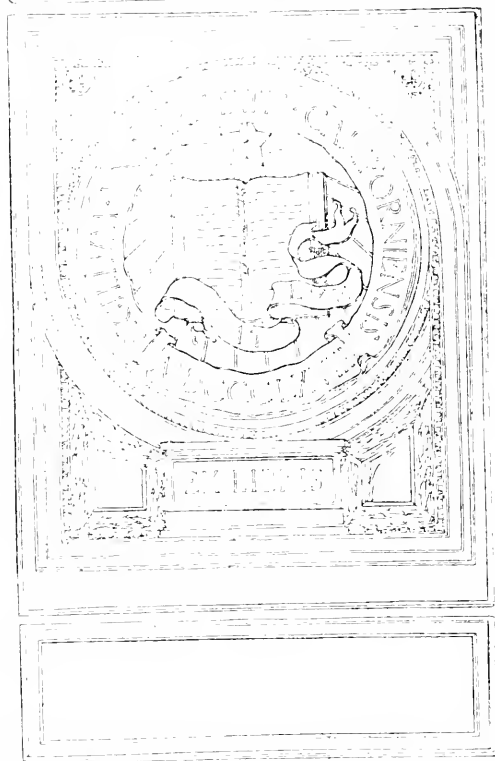
L82c

A
A
0
0
0
8
1
1
4
3
2
4



UC SOUTHERN REGIONAL LIBRARY FACILITY

UNIVERSITY OF CALIFORNIA
AT LOS ANGELES



THE CONSTITUTION AND ITS MAKERS

AN ADDRESS

DELIVERED BEFORE

THE LITERARY AND HISTORICAL ASSOCIATION
OF NORTH CAROLINA

AT

RALEIGH, N. C., NOVEMBER 28, 1911

BY

HENRY CABOT LODGE

UNIVERSITY OF CALIFORNIA
AT LOS ANGELES

DEC 20 1933

LIBRARY

PRESENTED BY MR. OVERMAN

DECEMBER 5, 1911.—Ordered to be printed



APPROVED FOR PUBLICATION
BY THE FBI

THE CONSTITUTION AND ITS MAKERS.

Mr. LODGE said:

Before this society and on such an occasion to speak on any subject not connected with the history of our common country would hardly be possible and would certainly not be fitting. I have, therefore, chosen a subject which touches the history of the United States at every point. I shall try to set before you some of the results of a great work in which your State and mine alike took part a century and a quarter ago and which possesses an interest and an importance as deep and as living to-day as at the moment of its inception. I shall touch upon some present questions, but I shall speak without the remotest reference to politics or parties, for my subject transcends both. I shall speak as a student of our history with reverence for the past and with a profound faith in the future. In a word, I shall speak simply as an American who loves his country "now and forever, one and inseparable."

A little less than twenty-five years ago great crowds thronged the streets of Philadelphia. Men and women were there from all parts of the United States; the city was resplendent with waving flags and brilliant with all the decorations which ingenuity could suggest, while the nights were made bright by illuminations which shone on every building. Great processions passed along the streets, headed by troops from the thirteen original States, marching in unusual order, with Delaware at the head, because that little State had been the first to accept the great instrument of government which now, having attained its hundredth year, was celebrated in the city of its birth. Behind the famous hall where independence was declared an immense crowd listened to commemorative speakers, and the President of the United States, a Democrat, honored the occasion with his presence and his words.

Two years later, in 1889, the same scenes were repeated in New York. Again the cannon thundered and again flags waved above the heads of the multitude gathered in the streets, through which marched a long procession, both military and civil, headed as before by the representatives of the original thirteen States. Again, at a great banquet, addresses were delivered and once more the President of the United States, this time a Republican, honored the occasion by his presence, and in the name of all the people of the country praised the great work of our ancestors.

In Philadelphia we celebrated the one hundredth anniversary of the formation of the Constitution of the United States. In New York we commemorated the one hundredth anniversary of the inauguration of the Government which that Constitution had brought into being. Through all the rejoicings of those days, in every spoken and in every written word, ran one unbroken strain of praise for the great instrument and of gratitude to the men who, in the exercise of

the highest wisdom, had framed it and brought it forth. All men recalled that it had made a nation from thirteen jarring States; that it had proved in its interpretation flexible to meet new conditions and strong to withstand injustice and wrong; that it had survived the shock of civil war; and that under it liberty had been protected and order maintained. The paean of praise rose up from all parts of this broad land unmarred by a discordant note. Everyone agreed with Gladstone's famous declaration, that the Constitution of the United States was the greatest political instrument ever struck off on a single occasion by the minds of men. We seemed, indeed, by all we then said and did to justify those foreign critics who reproached us for our blind reverence for our Constitution and our almost superstitious belief in its absolute wisdom and unexampled perfections.

Those celebrations of the framing of the Constitution and of the inauguration of the Government have been almost forgotten. More than twenty years have come and gone since the cheers of the crowds which then filled the streets of New York and Philadelphia—since the reverberations of the cannon and the eloquent voices of the orators died away into silence. And with those years, not very many after all, a change seems to have come in the spirit which at that time pervaded the American people from the President down to the humblest citizen in the land. Instead of the universal chorus of praise and gratitude to the framers of the Constitution the air is now rent with harsh voices of criticism and attack, while the vast mass of the American people, still believing in their Constitution and their Government, look on and listen, bewildered and confused, dumb thus far from mere surprise, and deafened by the discordant outcry so suddenly raised against that which they have always revered and held in honor. Many excellent persons believe apparently that beneficent results can be attained by certain proposed alterations in the Constitution, often, I venture to think, without examination of the history and theory of government and without measuring the extent or weighing the meaning of the changes which are urged upon us. But it is also true that everyone who is in distress, or in debt, or discontented, now assails the Constitution, merely because such is the present passion. Every reformer of other people's misdeeds—all of that numerous class which is ever seeking to promote virtue at somebody else's expense—pause in their labors to point out the supposed shortcomings of our National Charter. Every raw demagogue, every noisy agitator, incapable of connected thought and seeking his own advancement by the easy method of appealing to envy, malice, and all uncharitableness—those unlovely qualities in human nature which so readily seek for gratification under the mask of high sounding and noble attributes—all such people now lift their hands to tear down or remake the Constitution. In House and Senate one can hear attacks upon it at any time and listen to men deriding its framers and their work. No longer are we criticised by outsiders for having a superstitious reverence for our Constitution. Quite recently I read an article by an English member of Parliament (Mr. L. T. Hobhouse), a Liberal, I believe, with Socialist proclivities, who said that this reproach of an undue veneration for the Constitution ought no longer to be brought against us, because beneficent and progressive spirits were already beginning to

pull it to pieces and were seeking to modernize it in conformity with the clamor of the moment. All this is quite new in our history. We have as a people deeply revered our Constitution. We have realized what it has accomplished and what protection it has given to ordered freedom and individual liberty. Even the Abolitionists, when they denounced the Constitution for the shelter which it afforded to slavery, did not deny its success in other directions, and their hostility to the Constitution was one of the most deadly weapons used against them.

The enmity to the Constitution and the attacks upon it which have developed in the last few years present a situation of the utmost gravity. If allowed to continue without answer, they may mislead public opinion and produce the most baneful results. The people of the United States may come to believe that all these attacks are, in a measure at least, true. And therefore if they are not true, their falsity ought to be shown. Beside the question of the maintenance or destruction of the Constitution of the United States all other questions of law and policy sink into utter insignificance. In its presence party lines should disappear and all sectional differences melt away like the early mists of dawn before the rising sun. The Constitution is our fundamental law. Upon its provisions rests the entire fabric of our institutions. It is the oldest of written constitutions. It has served as a model for many nations, both in the Old World and in the New. It has disappointed the expectations of those who opposed it, convinced those who doubted, and won a success beyond the most glowing hopes of those who put faith in it. Such a work is not to be lightly cast down or set aside, or, which would be still worse, remade by crude thinkers and by men who live only to serve and flatter in their own interest the emotion of the moment. We should approach the great subject as our ancestors approached it—simply as Americans with a deep sense of its seriousness and with a clear determination to deal with it only upon full knowledge and after the most mature and calm reflection. The time has come to do this, not only here and now, but everywhere throughout the country.

Let us first consider who the men were who made the Constitution and under what conditions they worked. Then let us determine exactly what they meant to do—a most vital point, for much of the discussion to which we have been treated thus far has proceeded upon a complete misapprehension of the purpose and intent of the framers of the Constitution. Finally, let us bring their work and their purposes to the bar of judgment, so that we may decide whether they have failed, whether in their theory of government they were right or wrong then and now, or whether their work has stood the test of time, is broad based on eternal principles of justice, and, if rent or mangled or destroyed, would not in its ruin bring disaster and woes inestimable upon the people who shall wreck their great inheritance and, like

The base Indian, throw a pearl away,
Richer than all his tribe.

First, then, of the men who met in Philadelphia in May, 1787, with doubts and fears oppressing them, but with calm, high courage and with a noble aspiration to save their country from the miseries which threatened it, to lead it out from the wilderness of distractions in

which it was wandering blind and helpless, into the light, so that the chaos, hateful alike to God and men, might be ended and order put in its place. It is the fashion just now to speak of the framers of the Constitution as worthy, able, and patriotic persons whom we are proud to have embalmed in our history, but toward whom no enlightened man would now think of turning seriously for either guidance or instruction, so thoroughly has everything been altered and so much has intelligence advanced. It is commonly said that they dealt wisely and well with the problems of their day, but that of course they knew nothing of those which confront us, and that it would be worse than folly to be in any degree governed by the opinions of men who lived under such wholly different conditions. It seems to me that this view leaves something to be desired and is not wholly correct or complete. I certainly do not think that all wisdom died with our fathers, but I am quite sure that it was not born yesterday. I fully realize that in saying even this I show myself to be what is called old fashioned, and I know that a study of history, which has been one of the pursuits of my life, tends to make a man give more weight to the teachings of the past than it is now thought they deserve. Yet, after all allowance is made, I can not but feel that there is something to be learned from the men who established the Government of the United States, and that their opinions, the result of much and deep reflection, are not without value, even to the wisest among us.

On questions of this character, I think, their ideas and conclusions are not lightly to be put aside; for, after all, however much we may now gently patronize them as good old patriots long since laid in their honored graves, they were none the less very remarkable men, who would have been eminent in any period of history and might even, if alive now, attain to distinction. Let us glance over the list of delegates to the Constitutional Convention in Philadelphia in 1787. I find, to begin with, that their average age was 43, which is not an extreme senectitude, and the ages range from Franklin, who was 81, to John Francis Mercer, of Virginia, who was 28. Among the older men who were conspicuous in the convention were Franklin, with his more than 80 years; Washington, who was 55; Roger Sherman, who was 66; and Mason and Wythe, of Virginia, who were both 61. But when I looked to see who were the most active forces in that convention, I found that the New Jersey plan was brought forward by William Paterson, who was 42; that the Virginia plan was proposed by Edmund Randolph, who was 34; while Charles Pinckney, of South Carolina, whose plan played a large part in the making of the Constitution, was only 29. The greatest single argument, perhaps, which was made in the convention was that of Hamilton, who was 30. The man who contributed more, possibly, than any other to the daily labors of the convention and who followed every detail was Madison, who was 36. The Connecticut compromise was very largely the work of Ellsworth, who was 42; and the committee on style, which made the final draft, was headed by Gouverneur Morris, who was 35. Let us note, then, at the outset that youth and energy, abounding hope, and the sympathy for the new times stretching forward into the great and uncharted future, as well as high ability, were conspicuous among the men who framed the Constitution of the United States.

Their presiding officer was Washington, one of the great men of all time, who had led the country through seven years of war, and of whom it has been said by an English historian that "no nobler figure ever stood in the forefront of a nation's life." Next comes Franklin, the great man of science, the great diplomatist, the great statesman and politician, the great writer; one of the most brilliant intellects of the eighteenth century, who in his long life had known cities and men as few others have ever known them. There was Hamilton, one of the greatest constructive minds that modern statesmanship has to show, to whose writings German statesmen turned when they were forming their Empire forty years ago and about whom in these later days books are written in England, because Englishmen find in the principal author of the Federalist the great exponent of the doctrines of successful federation. There, too, was Madison, statesman and law-maker, wise, astute, careful, destined to be, under the Government which he was helping to make, Secretary of State and President. Roger Sherman was there, sagacious, able, experienced; one of the leaders of the Revolution and a signer of the Declaration of Independence, as he was of the Constitution. Great lawyers were present in Philadelphia in that memorable summer of 1787, such men as Ellsworth and Wilson and Mason and Wythe. It was, in a word, a very remarkable body which assembled to frame a constitution for the United States. Its members were men of the world, men of affairs, soldiers, lawyers, statesmen, diplomatists, versed in history, widely accomplished, deeply familiar with human nature. I think that without an undue or slavish reverence for the past or for the men of a former generation, we may fairly say that in patriotism and in intellect, in knowledge, experience, and calmness of judgment, these framers of the Constitution compare not unfavorably with those prophets and thinkers of to-day who decry the work of 1787, would seek to make it over with all modern improvements, and who with unconscious humor declare that they are engaged in the restoration of popular government.

That phrase is in itself suggestive. That which has never existed can not be restored. If popular government is to be restored in the United States it must have prevailed under the Constitution as it is, and yet those, who just now are so devoured by anxiety for the rights of the people, propose to effect the restoration they demand by changing the very Constitution under which popular government is admitted by their own words to have existed. I will point out presently the origin of this confusion of thought. It is enough to say now that for more than a century no one questioned that the government of the Constitution was in the fullest sense a popular government. In 1863 Lincoln, in one of the greatest speeches ever uttered by man, declared that he was engaged in trying to save government by the people. Nearly thirty years later, when we celebrated the one hundredth anniversary of the Constitution, the universal opinion was still the same. All men then agreed that the Government which had passed through the fires of civil war was a popular government. Indeed, this novel idea of the loss of popular government which it is proposed to restore by mangling the Constitution under which it has existed for more than a century is very new; in fact, hardly ten years old.

This first conception of our Constitution as an instrument of popular government, so long held unquestioned, was derived from the

framers of the Constitution themselves. They knew perfectly well that they were founding a government which was to be popular in the broadest sense. The theory now sedulously propagated, that these great men did not know what they were about, or were pretending to do one thing while they really did another, is one of the most fantastic delusions with which agitators have ever attempted to mislead or perplex the public mind. The makers of the Constitution may have been right or they may have been wrong in the principles upon which they acted or in the work they accomplished, but they knew precisely what they meant to do and why they did it. No man in history ever faced facts with a clearer gaze than George Washington, and when, after the adjournment of the convention he said, "We have raised a standard to which the good and wise can repair; the event is in the hands of God," he labored under no misapprehension as to the character of the great instrument where his name led all the rest.

It is the fashion to say that since then great changes have occurred and wholly new conditions have arisen of which the men of 1787 could by no possibility have had any knowledge or anticipation. This is quite true. They could not have foreseen the application of steam to transportation, or of electricity to communication, which have wrought greater changes in human environment than anything which has happened to man since those dim, prehistoric, unrecorded days when some one discovered the control of fire, invented the wheel, and devised the signs for language, masterpieces of intelligence with which even the marvels of the last century can not stand comparison. The men of the Constitution could as little have foreseen what the effects of steam and electricity would be as they could have anticipated the social and economic effects of these great inventions or the rapid seizure of the resources of nature through the advances of science and the vast fortunes and combinations of capital which have thus been engendered. Could they, however, with prophetic gaze have beheld in a mirror of the future all these new forces at work, so powerful as to affect the very environment of human life, even then they would not, I think, have altered materially the Constitution which they were slowly and painfully perfecting. They would have kept on their way, because they would have seen plainly what is now too often overlooked and misunderstood, that all the perplexing and difficult problems born of these inventions and of the changes, both social and economic, which have followed were subjects to be dealt with by laws as the questions arose, and laws and policies were not their business. They were not making laws to regulate or to affect either social or economic conditions. Their work was not only higher but far different. They were laying down certain great principles upon which a government was to be built and by which laws and policies were to be tested as gold is tested by a touchstone.

Upon the work in which they were engaged social and economic changes or alterations in international relations and political conditions, no matter how profound or unforeseen—and none could have been more profound or more unforeseen than those which have actually taken place—had little bearing or effect. They were framing a government, and human nature was the one great and controlling element in their problem. Human nature, with its strength and its weakness, its passions and emotions so often dominating its reason, its selfish desires and its nobler aspirations, was the same then as now.

There is no factor so constant in human affairs as human nature itself and in its essential attributes it is the same to-day as it was among the builders of the Pyramids. As to the principles of government which the framers of the Constitution wished to adapt to that portion of human nature which had gained a foothold on the North American Continent there was little to be discovered. There is no greater fallacy than to suppose that new and fundamental principles of government are constantly to be invented and wrought out. Laws change and must change with the march of humanity across the centuries as it alteration finds in the conditions about it, but fundamental principles and theories of government are all extremely old. The very words in which we must express ourselves when we speak of forms of government are all ancient. Let me recall a few facts which every schoolboy knows and which anyone can obtain by indulging in that too much neglected exercise of examining a dictionary. Anarchy, for example, is the Greek word "rule" or "command" with the alpha privative in the form of "an" prefixed, and means the state of a people without government. Monarchy is the rule of one; oligarchy is the rule of a few. We can not state what our own Government is without using the word "democracy," which is merely the Greek word *δημοκρατία* and means popular government or the rule of the people. Aristocracy, ideally as Aristotle had it, is the rule of the best, but even in those days it meant in practice the rule of the best-born or nobles. Plutocracy is the rule of the rich; autocracy, self-derived power—the unlimited authority of a single person. Ochlocracy is the rule of the multitude, for which we have tried to substitute the hideous compound "mobocracy." As with the words, so with the things of which the words are the symbol; the people who invented the one had already devised the other. The words all carry us back to Greece, and all these various forms of government were well known to the Greeks and had been analyzed and discussed by them with a brilliancy, a keenness, and an intellectual power which have never been surpassed. If you will read *The Republic* and *The Laws* of Plato and supplement that study by an equally careful examination of what Aristotle has to say on government you will find that those great minds have not only influenced human thought from that time to this, but that there is little which they left unsaid. It is the fashion, for example, to speak of socialism as if it were something new, a radiant discovery of our own time which is to wipe away all tears. The truth is that it is very old, as old in essence as human nature, for it appeals to the strong desire in every man to get something for nothing and to have someone else bear his burdens and do his work for him. As a system it is amply discussed by Plato, who, in *The Republic*, urges measures which go to great extremes in this direction. In the fourth century of our era a faction called the Circumcellions were active as socialists and caused great trouble within the weakening Empire of Rome. The real difficulty historically with the theories of socialism is not that they are new, but that they are very, very old, and wherever they have been put in practical operation on a large scale they have resulted in disorder, retrogression, and in the arrest of civilization and progress. Broadly stated, there have been only two marked additions to theories or principles of government since the days of the Greeks and the Romans. One is the representative principle developed by the people of England in the "Mother of Parlia-

ments" and now spread all over the world, and the other is the system of federation on a large scale embracing under a central government of defined powers a union of sovereign and self-governing States which the world owes in its bold and broad application to the men who met at Philadelphia to frame our Constitution in 1787.

With these exceptions the framers of the Constitution dealt with the theories and systems of government which have been considered, discussed, and experimented with for more than two thousand years and which are to-day, a century later, the same as in 1787, unchanged and with no additions to their number. In order to reach the essence of what the makers of the Constitution tried and meant to do, which it is most important to know and reflect upon deeply before we seek to undo their work, let us begin by dismissing from our consideration all that is unessential or misleading. Let us lay aside first the word republic, for a republic denotes a form and not a principle. A republic may be democratic like ours, or an autocracy like that of Augustus Cæsar, or an oligarchy like Venice, or a changing tyranny like some of those visible in South America. The word has become as inaccurate, scientifically speaking, as the word monarchy which may be in reality a democracy as in England or Norway, constitutional as in Italy, or a pure despotism as in Russia. Let us adhere in this discussion to the scientifically exact word "democracy." Next let us dismiss all that concerns the relations of the States to the National Government. Federation, as I have said, was the great contribution of the Philadelphia convention to the science of government. The framers of the Constitution, if they did not invent the principle, applied it on such a scale and in such a way that it was practically a discovery, a venture both bold and new, as masterly as it was profoundly planned. With the love of precedents characteristic of their race they labored to find authority and example in such remote and alien arrangements as the Achean League and the Amphictyonic Council, but the failure of these precedents as such was the best evidence of the novelty and magnitude of their own design. Their work in this respect has passed through the ordeal of a great war; it has been and is to-day the subject of admiration and study on the part of foreign nations, and not even the most ardent reformer of this year of grace would think, in his efforts to restore popular government, of assailing the Union of Sovereign States. Therefore we may pass by this great theme which was the heaviest part of the task of our ancestors.

In the same way we may dismiss, much as it troubled the men of 1787, all that relates to the machinery of government, such as the electoral college, the tenure of office, the methods of electing Senators and Representatives, and the like. These matters are important; many active thinkers in public life seek to change them, not for the better, as I believe, but none the less these provisions concern only the mechanism of government; they do not go to the root of the matter, they do not affect the fundamental principles on which the Government rests.

By making these omissions we come now to the vital point, which is, What kind of a government did the makers of the Constitution intend to establish and how did they mean to have it work? They were, it must be remembered, preparing a scheme of government for a people peculiarly fitted to make any system of free institutions work

well. The people of the United Colonies were homogeneous. They came in the main from Great Britain and Ireland, with the addition of the Dutch in New York, of some Germans from the Palatinate and of a few French Huguenots, whose ability and character were as high as their numbers were relatively small. But an overwhelming majority of the American people in 1787 were of English and Scotch descent and they, as well as the others from other lands, were deeply imbued with all those principles of law which were the bulwarks of English liberty. In this new land men had governed themselves and there was at that moment no people on earth so fit for or so experienced in self-government as the people of the Thirteen Colonies. Their colonial governments were representative and in essence democratic. They became entirely so when the Revolution ended and the last English governor was withdrawn. In the four New England Colonies local government was in the hands of the town meetings, the purest democracies then or now extant, but it is best to remember, what the men of 1787 well knew, that these little democracies moved within fixed bounds determined by the laws of the States under which they had their being.

For such a people, of such a character, with such a past and such habits and traditions only one kind of government was possible, and that was a democracy. The makers of the Constitution called their new Government a Republic and they were quite correct in doing so, for it was of necessity republican in form. But they knew that what they were establishing was a democracy. One has but to read the debates to see how constantly present that fact was to their minds. Democracy was then a very new thing in the modern world. As a system it had not been heard of, except in the fevered struggles of the Italian City Republics, since the days of Rome and Greece, and although the convention knew perfectly well that they were establishing a democracy and that it was inevitable that they should do so, some of them regarded it with fear and all with a deep sense of responsibility and caution. The logical sequence as exhibited in history and as accepted by the best minds of the eighteenth century, struggling to give to men a larger freedom, was democracy—*anarchy*—*despotism*. The makers of the Constitution were determined that so far as in them lay the American Republic should never take the second step, never revolve through the vicious circle which had culminated in empire in Rome, in the tyrants of the Grecian and the despots of the Italian Cities which in their turn had succumbed to the absolutism of foreign rulers.

The vital question was how should this be done; how should they establish a democracy with a strong government—for after their experience of the confederation they regarded a weak government with horror—and at the same time so arrange the government that it should be safe as well as strong and free from the peril of lapsing into an autocracy on the one hand, or into disorder and anarchy on the other? They did not try to set any barrier in the way of the popular will, but they sought to put effective obstacles in the path to sudden action which was impelled by popular passion, or popular whim, or by the excitement of the moment. They were the children of the "Great Rebellion" and the "Blessed Revolution" in the England of the seventeenth century, and they were steeped in the doctrine of limiting the power of the King. But here they were dealing with a sovereign who could not be limited, for

while a king can be limited by transferring his power to the people, when the people are sovereign their powers can not be transferred to anybody. There is no one to transfer them to, and if they are taken away the democracy ceases to exist and another government, fundamentally different, takes its place.

The makers of the Constitution not only knew that the will of the people must be supreme, but they meant to make it so. That which they also aimed to do was to make sure that it was the real will of the people which ruled and not their momentary impulse, their well-considered desire and determination and not the passion of the hour, the child, perhaps, of excitement and mistake inflamed by selfish appeals and terrorized by false alarms. The main object, therefore, was to make it certain that there should be abundant time for discussion and consideration, that the public mind should be thoroughly and well informed and that the movements of the machinery of government should not be so rapid as to cut off due deliberation. With this end in view they established with the utmost care a representative system with two chambers and an executive of large powers, including the right to veto bills. They also made the amendment of the Constitution a process at once slow and difficult, for they intended that it should be both, and indeed that it should be impracticable without a strong, determined, and lasting public sentiment in favor of change.

Finally they established the Federal judiciary, and in the Supreme Court of the United States they made an addition to the science of government second only in importance to their unequalled work in the development of the principle of federation. That great tribunal has become in the eyes of the world the most remarkable among the many remarkable solutions devised by the Convention of 1787 for the settlement of the gravest governmental problems. John Marshall, with the intellect of the jurist and the genius of the statesman, saw the possibilities contained in the words which called the court into being. By his interpretation and that of his associates and their successors the Constitution attained to flexibility and escaped the rigidity which then and now is held up as the danger and the defect of a written instrument. In their hands the Constitution has been expanded to meet new conditions and new problems as they have arisen. In their hands also the Constitution has been the protection of the rights of States and the rights of men, and laws which violated its principles and its provisions have been set aside.

By making the three branches of the Government, the executive, the legislative, and the judicial, entirely separate and yet coordinate and by establishing a representative system and creating a Supreme Court of extraordinary powers the framers of the Constitution believed that they had made democracy not only all powerful but at the same time safe and that they had secured it from gradual conversion into autocracy on the one hand and from destruction by too rapid motion and too quick response to the passions of the moment on the other. If ever men were justified by results they have been. The Constitution in its development and throughout our history has surpassed the hopes of its friends and utterly disappointed the predictions and the criticisms of its foes. Under it the United States has grown into the mighty Republic we see to-day. New States have come into the Union, vast territories have been acquired, population and

wealth have increased to a degree which has amazed the world, and life, liberty, and property have been guarded beneath the flag which is at once the symbol of the country and of the Constitution under which the Nation has risen to its high success. Such results would seem to be a potent argument in favor of the instrument of government through which they have been achieved. But to argue from results seems just now out of fashion. Actual accomplishment it would appear is nothing. According to the new dispensation our decision must be made on what is promised for the future, not on what has been done in the past. Under this novel doctrine, as I have observed it, we are to be guided only by envy and discontent and are to act exclusively on the general principle that whatever is is wrong.

What, then, is the plan by which popular government, which existed under the Constitution for more than a century and which has been mysteriously lost during the past few years, is to be restored to us? It is proposed, to put it in a few words, to remove all the barriers which the makers of the instrument established in order to prevent rash, hasty, and passionate action and to secure deliberation, consideration, and due protection for the rights of minorities and of individuals. This is to be accomplished in two ways, by emasculating the representative system through the compulsory initiative and referendum and by breaking down the courts through the recall. These are the changes by which it is intended to revive popular government. Incidentally they strike at the very heart of the Constitution as the framers planned and made it, for they will convert the deliberate movement of the governmental machinery, by which its makers intended to secure to democracy both permanence and success, into an engine which starts at the touch of an electric button, which is as quick in response as a hair-trigger pistol and as rapid in operation as a self-cocking revolver. These new and precious ideas are of a ripe age; in fact they have passed many hundreds of years beyond the century fixed by Dr. Johnson for the establishment of a literary reputation at a point where it might be intelligently discussed. Let us therefore consider and criticize them.

The compulsory initiative and the compulsory referendum need not detain us long, for the effect of those devices is obvious enough. The entire virtue or the entire vice—each of us may use the word he prefers—of these schemes rests in the word "compulsory." The initiative without compulsion is complete in the right of petition secured by the first of the first ten amendments to the Constitution, which really constituted a bill of rights. The right of petition became the subject of bitter controversy at a later time and was vindicated once for all by John Quincy Adams's great battle in its behalf, more than three-quarters of a century ago. There are few instances where petitions representing a genuine popular demand have not met a response in action, whether in Congress or in the State legislatures; still fewer where respectful attention and consideration have not been accorded to them. But the responsibility for action and the form such action should take has rested with the representative body. When the initiative is made compulsory a radical change is effected. A minority, sometimes a small minority of the voters, always a small minority of the people, can compel the legislature to pass a law and submit it to the voters even when a very

large majority of the people neither ask for nor, so far as the evidence goes, desire it. In this way all responsibility is taken from the representative body and they become mere clerks for drafting and recording laws, poor puppets who move mechanically when some irresponsible outsiders twitch the strings. It is the substitution of government by factions and fractions for government by the people. The representative body as hitherto constituted represented the whole people. Under the new plan it is to be merely the helpless instrument of a minority, perhaps a very small minority, of the voters.

The voluntary referendum has always existed in this country. In the National Government, owing to our dual or Federal form, the referendum on constitutional amendments is necessarily made to the States and it has never been suggested for the laws of the United States, owing to both physical and constitutional difficulties. In the States the referendum has always been freely used, not only for constitutional and constitutional amendments but for laws, especially for city charters, local franchises, and the like. But if, on the demand of a minority of the voters, the referendum is made compulsory, all responsibility vanishes from the representative body. The representative no longer seeks to represent the whole people or even his own constituency, but simply votes to refer everything to the voters, and covers himself completely by pointing to the compulsory referendum. On the other hand, the voters are called upon to legislate. Of the mass of measures submitted they know and can know nothing. Experience shows that in all referendums a large proportion of the voters decline to vote. Whether this is due to indifference or to lack of information the result is the same. It proves that this system demands from the voters what the most intelligent voters in the world are unable to give. They are required to pass upon laws, many of which they have neither time nor opportunity to understand, without deliberation and without any discussion except what they can gather from the campaign orator, who is, as a rule, interested in other matters, or from an occasional article in a newspaper. They can not alter or amend. They must vote categorically "yes" or "no." The majority either fails to vote, and the small and interested minority carries its measure, or the majority, in disgust, votes down all measures submitted, good and bad alike, because they do not understand them and will not vote without knowing what their votes mean.

The great laws which, both in England and the United States, have been the landmarks of freedom and made ordered liberty possible were not passed and never could have been perfected and passed in such a way as this. This new plan is spoken of by its advocates as progressive. As a matter of fact, it is the reverse of progressive, it is reactionary. Direct legislation by popular vote was familiar, painfully familiar, to Greece and Rome. In both it led through corruption, violence, and disorder to autocracy and despotism. The direct-vote system also proved itself utterly incapable of the government of an extended empire and of large populations. Where government by direct vote miserably failed, representative government, after all deductions have been made, has brilliantly succeeded. The development of the principle and practice of representative government was, as I have already pointed out, the one great contribution of modern times to the science of government. It has shown itself

capable of preserving popular government and popular rights without the violence and corruption which resulted of old in anarchy and despotism and at the same it has proved its adaptability to the management of large populations and the efficient government of great empires. Representative government was an enormous advance over government by the direct vote of the forum, the agora, or the market place, which had preceded it, and which had gone down in disaster. It is now proposed to abandon that great advance and to return to the ancient system with its dark record of disorder and failure. This is not progress. It is retreat and retrogression. It is the abandonment of a great advance and a return to that which is not only old and outworn, but which history and experience have alike discredited.

Look now for a moment at representative government as we ourselves have known it. Let us not forget, in the first place, that the Congress of the United States under the Constitution has been in continuous existence for more than 120 years; that with the single exception of the "Mother of Parliaments" it is much the oldest representative body of a constitutional character now existing in the world. Let us also remember that the history of the American Congress is in large part the history of the United States, and that we are apt to be proud of that history as a whole and of the many great things we as a people have accomplished. Yet whatever praise history accords to the Congress of the United States in the past the Congress of the moment and the members of that body in either branch receive but little commendation from their contemporaries. This is perhaps not unnatural, and it certainly has always been customary. Legislative bodies have rarely touched the popular imagination or appeared in a dramatic or picturesque attitude. The Conscript Fathers, facing in silence the oncoming barbarians of Gaul; Charles the First, attempting to arrest the five members; the Continental Congress adopting the Declaration of Independence; the famous Oath of the Tennis Court are almost the only instances which readily occur to one's mind of representative and legislative bodies upon whom for a brief instant has rested the halo of heroism and from which comes a strong appeal to the imagination. The men who fight by land and sea rouse immediate popular enthusiasm, but a body of men engaged in legislation does not and can not offer the fascination or the attraction which are inseparable from the individual man who stands forth alone from the crowd in any great work of life, whether of war or peace.

We may accept without complaint this tendency of human nature, but I think every dispassionate student of history, as well as every man who has had a share in the work of legislation, may rightfully deprecate the indiscriminate censure and the consistent belittling which pursue legislative bodies. This attitude of mind is not confined to the United States. The press of England treats its Parliament severely enough, although on the whole with more respect than is the case with the American press in regard to the American Congress. But running through English novels and essays we find as a rule the same sneer at the representatives of the people as we do here. Very generally, both in this country and abroad, those who write for the public seem to start with the proposition that to be a Member of Congress or a member of Parliament, or a member of the Chamber of

Deputies in France implies some necessary inferiority of mind or character. I do not desire to be rash or violent, but I think this theory deserves a moment's examination and is perhaps open to some doubt. As Mr. Reed once said, it is a fair inference that a man who can impress himself upon 200,000 people, or upon the whole population of a great State, sufficiently to induce them to send him to the House or Senate has something more than ordinary qualities and something more than ordinary force. Then, again, as Edmund Burke remarked, you can not draw an indictment against a whole people, nor, I may add, can you draw an indictment against an entire class. There are good men and bad men in business and in the professions, in the ministry, in medicine, in law, and among scholars. Virtue is not determined by occupation. There are, I repeat, good and bad men in every profession and calling, among high and low, rich and poor, and the honest men who mean to do right largely preponderate, for if they did not the whole social structure would come crashing to the ground. What is true of business and the professions is true of Congress. There are good and bad men in public life, and the proportion of good to bad, I believe, compares favorably with that of any other occupation. Public men live in the fierce light which beats upon them as upon the throne, a light never fiercer or more pitiless than now, and for this reason their shortcomings are made more glaring and their virtues by contrast more shadowed than in private life. This is as it should be, for the man who does wrong in private life is far less harmful than the public servant who is false to his trust. To inflict upon the public servant who is a wrongdoer the severest reprobation is necessary for the protection of the community, but for this very reason we should be extremely careful that no reprobation should be visited unjustly on any public man. It is an evil thing to betray the public trust, but it is an equally evil thing to pour wholesale condemnation upon the head of every man in public life, good and bad alike. That which suffers most from an injustice like this in the long run is not the public servant who has been unfairly dealt with, for the individual passes quickly, but the country itself. After all, the voters make the Representative. If he is not of the highest type, he appears to be that which the majority prefers. Wholesale criticism and abuse of the Representatives reflect more on the constituencies, if we stop to consider, than on those whom the constituencies select to represent them. Indiscriminate condemnation and equally indiscriminate belittling of the men who make and execute our laws, whether in State or Nation, is not only a reflection upon the American people but is a blow to the United States and every State in it. They help the guilty to escape and injure the honest and the innocent. They destroy the people's confidence in their own Government and lower the country in the eyes of foreign nations.

The Congress of the United States embodies the representative principle. The principle of representation, I repeat, has been the great contribution of the English-speaking race to the science and practice of government. The Greeks and the Romans, let me say once more, had pure democracy and legislation by direct vote in theory, at least, and we have but to read Plato's Republic and The Laws to learn the defects of the system in use in Athens. Greece failed to establish an empire; she touched the highest peaks of civilization, and finally went to pieces politically beneath the onset of

Rome. Rome established a great empire, but, after years of bloody struggles between aristocracy and democracy, it ended in a simple despotism. The free cities of Italy oscillated between anarchy and tyranny, only to fall victims in the end to foreign masters. In Florence they had elections every three months and a complication of committees and councils to interpret the popular will. Yet the result was the Medicis and the Hapsburgs.

It is also to be remembered that the representative principle has been coincident with political liberty. Whatever its shortcomings or defects, and, like all things human, it has its grave defects, it none the less remains true that the first care of every "strong man," every "savior of society," every "man on horseback," of every autocrat, is either to paralyze or to destroy the representative principle. It may be that the representative principle is not the cause of political liberty, but there can be no question whatever that the two have always gone hand in hand and that the destruction of one has been the signal for the downfall of the other. The Congress of the United States and the legislatures of the several States embody the representative principle. By that principle your laws have been made and the republican form of government sustained for more than a century. Whatever its shortcomings, it has maintained the Government of the United States and upheld law and order throughout our borders.

The framers of our Government separated the executive from the legislative branch. They deemed both essential to freedom. The constitution of my State declares that the government it establishes is to be a government of laws and not of men; a noble principle and one worthy of fresh remembrance. With such a history, and typifying as it does the great doctrines which were embodied in the Declaration of Independence, the Constitution of the United States, and the institutions of England, it may fairly be asked that if the representative principle must be criticized, as it should be, with severity when it errs, it should also be treated with that absolute justice which is not only right in the abstract but which is essential to the maintenance of law, order, and free government, to human progress and to the protection of the weak, even as the fathers designed that it should be. When we blame its failures let us not forget its services. They have broadened freedom down from precedent to precedent. They shine across those pages of history which tell the great story of the advance of liberty and of the ever-widening humanity which seeks to make the world better and happier for those who most need happiness and well-being. In beneficent results for the people at large no other form of government ever attempted can compare with it for a moment.

The worst feature of the compulsory initiative and referendum lies therefore in the destruction of the principle of representation. Power without responsibility is a menace to freedom and good government. Responsibility without power is inconceivable, for no man in his senses would bear such a burden. But when responsibility and power are both taken away, whether from the executive or the representatives, the result is simple inanition. No man fit by ability and character to be a representative would accept the office under such humiliating conditions. Those who accepted it would do so for the

pecuniary reward which the office carried and would sink rapidly into mere machines of record, neither knowing nor caring what they did. With a representative body thus reduced to nothingness we are left with the people, armed only with their votes, and with an executive who has necessarily absorbed all the real powers of the State. This situation is an old story and has always ended in the same way. It presents one of those rare cases in which the teaching of history is uniform. When the representative principle has departed and only its ghost remains to haunt the Capitol, liberty has not lingered long beside its grave. The rise of the representative principle and its spread to new lands to-day marks the rise of popular government everywhere. Wherever it has been betrayed or cast down the government has reverted to despotism. When representative government has perished freedom has not long survived.

Most serious, most fatal indeed are the dangers threatened by the insidious and revolutionary changes which it is proposed to make in our representative system, upon which the makers of the Constitution relied as one of the great buttresses of the political fabric which was to insure to popular government, success and stability. Yet even these changes are less ruinous to the body politic, to liberty and order than that which proposes to subject judges to the recall. No graver question has ever confronted the American people.

The men who framed the Constitution were much nearer to the time when there was no such thing as an independent judiciary than we are now. The bad old days, when judges did the bidding of the King, were much more vivid to them than to us. What is a commonplace to us was to them a comparatively recent and a hardly won triumph. The fathers of some of those men—the grandfathers of all—could recall Jeffreys and the "Bloody Assize." They knew well that there could be no real freedom, no security for personal liberty, no justice, without independent judges. It was for this reason that they established the judiciary of the United States with a tenure which was to last during good behavior and made them irremovable except by impeachment. The Supreme Court then created and the judiciary which followed have, as I have already said, excited the admiration of the civilized world. The makers of the Constitution believed that there should be no power capable of deflecting a judge from the declaration of his honest belief, no threat of personal loss, no promise of future emolument, which could be held over him in order to sway his opinion. This conviction was ingrained and born with them, as natural to them as the air they breathed, as vital as their personal honor. How could it have been otherwise? The independence of the judiciary is one of the great landmarks in the long struggle which resulted in the political and personal freedom of the English-speaking people. The battle was fought out on English soil. If you will turn to the closing scenes of Henry IV, you will find there one of the noblest conceptions of the judicial office in the olden time ever expressed in literature. It was written in the days of the last Tudor or of the first Stuart, in the time of the Star Chamber, of judges who decided at the pleasure of the King and when Francis Bacon, Lord Chancellor of England, took bribes or gifts. Yet lofty as is the conception, you will see that Shakespeare regarded the judge as embodying the person, the will, and the authority of the King.

We all know how the first two Stuarts used the courts to punish their enemies and to prevent the assertion of political rights, which are now such commonplaces that the fact that they were ever questioned is forgotten. The tyranny of the courts was one of the chief causes which led to the great rebellion, and out of that great rebellion, when the third Stuart had been restored, came the habeas corpus act, which has done more to protect personal liberty than any act ever passed. But the second Charles and the second James had learned nothing as to the judges. They expected them to do their bidding when the King had any interest at stake, and under the last Stuart the courts reached a very low point and the legal history of the time is characterized by the evil name of Jeffreys. When the lawyers went to pay their homage to William of Orange, they were headed by Sergt. Maynard, then 90 years of age. "Mr. Sergeant," said the prince, "you must have survived all the lawyers of your standing." "Yes, sir," said the old man, "and, but for Your Highness, I should have survived the laws too." The condition of the courts was indeed one of the strongest of the many bitter grievances which wrought the Revolution that placed William of Orange on the English throne. In the famous bill of rights there is no provision in regard to the courts and it is not quite clear why it was omitted, although, apparently, it was due to an oversight. In any event it was not forgotten. It was brought forward more than once in Parliament, but William announced that he would not assent to any act making the judges independent of the Crown. As his reign drew toward its close, however, he signified that although he would veto a separate act he would accept the independence of the judiciary if provided for in the act of settlement which was to determine the succession to the throne of England. Therefore we find in the act of settlement the clause which declares that the judges shall hold office during good behavior—"quamdiu se bene gesserint"—and shall be removable only on the request of both houses of Parliament.

It is necessary to pause a moment here and consider briefly the provision of the act of settlement for the removal of judges on an address by the houses, because it has been most incorrectly used by persons ignorant probably of its history as a precedent justifying the recall. The clause was inserted not for the purpose of controlling the judges but to protect them still further against the power of the Crown by which they had hitherto been dominated. The history of the clause since its enactment demonstrates what its purpose was as well as the fulfillment of that purpose in practice. During the two centuries which have elapsed since William III gave his assent to the act there has been, so far as I can learn, only one removal on address, that of Sir Jonah Barrington, an Irish judge, in 1806, more than a hundred years ago. There have been several cases where removal was petitioned for, but Barrington's was, I think, the only one in which the demand was successful. The procedure employed shows that there is no resemblance whatever between the removal of a judge upon the address of the lawmaking body and the popular recall. They are utterly different, instituted for different purposes, and the former furnishes in reality a strong argument against the latter. In all the cases of removal or attempted removal by address of Parliament the accused judge was carefully tried before a special committee

of each house; he could be heard at the bar of either house, he could and did employ counsel, and could summon and cross-examine witnesses. This process is as far removed from the recall as the zenith from the nadir, for under the recall the accused judge has no opportunity to summon or cross-examine witnesses, to appear by counsel, or to be properly heard and tried. He is obliged under the recall to make an appeal by the usual political methods and at the same time to withstand another candidate, while he is forced to seek a hearing from audiences ignorant of the law and inflamed perhaps against him by passion and prejudice. He has no chance whatever of a fair trial.

Some of our States borrowed this provision of the act of settlement when they formed their constitutions. My own State of Massachusetts was one of them. The power has been but rarely exercised by the legislature in the hundred and thirty years which have passed since our constitution was adopted, but it so happened that when I was in the legislature a case occurred, and I was a member of the committee on the judiciary to whom the petitions were referred. The accused judge was tried as elaborately and fairly as he could have been by any court or by the Senate if he had been impeached. He had counsel, he summoned and cross-examined witnesses, and the trial, for it was nothing less, occupied weeks. The committee reported in favor of removal, but the house rejected the committee's report. Some years later, after a similar trial, the address passed both houses and the judge was removed by the governor for misdemeanors and malfeasance in office. A mere statement of the procedure shows at once that the removal by address is simply a summary form of impeachment with no relation or likeness to the recall. Removal by address is no more like the recall than impeachment is. If successful, they all result in the retirement of the judge accused, but there the resemblance ends. The makers of the Constitution did not follow the act of settlement and adopt the removal on address. They no doubt perceived its advantages, because it made possible the removal of a judge incapacitated by insanity or age or disease without inflicting upon him the stigma of an impeachment, but they also saw that the removal by address might be used for political and personal reasons, of which one instance occurred in my own State, and they probably determined that the risk of its abuse outweighed any possible benefit which might flow from its judicious exercise.

They placed their courts as far as they could on the great heights of justice, above the gusts of popular passion. They guarded them in every possible way. They knew that judges were human and therefore fallible. They knew that the courts would move more slowly than popular opinion or than Congress, but they felt equally sure that they would in the end follow that public opinion which was at once settled and well considered. All this they did because all history and especially the history and tradition of their own race taught them that the strongest bulwark of individual freedom and of human rights was to be found ultimately in an independent court, the corner stone of all liberty. Their ancestors had saved the judges from the Crown. They would not retrace their steps and make them subject to the anger or the whim of anyone else.

They wished men to be free,
As much from mobs as kings,
From you as me.

The problem which they then solved has in no wise changed. The independence of the judiciary is as vital to free institutions now as then. The system which our forefathers adopted has worked admirably and has commanded the applause of their children and of foreign nations, who Bacon tells us are a present posterity. Now it is proposed to tear this all down and to replace the decisions of the court with the judgment of the market place. If I may borrow a phrase from the brilliant speech made recently by Mr. Littleton in the House, it is intended to substitute "government by tumult for government by law."

Those who advocate this revolution in our system of government seem to think that a judge should be made responsive to the popular will, to the fleeting majority of one day which may be a minority the next. They would make their judges servile, and servile judges are a menace to freedom, no matter to whom their servitude is due. They talk of a judge's duty to his constituents. A judge on the bench has no constituents and represents no one. He is there to administer justice. He is there not to make laws, but to decide what the law is. He must know neither friend nor foe. He is there to declare the law and to do justice between man and man.

The advocates of the recall seem to believe that with subservient judges glancing timidly to right and left to learn what voters think, instead of looking steadfastly at the tables of the law, the poor will profit and the rich will suffer; that the individual will win and the corporation lose; that the powerful will be crushed and the weak will triumph, while the sword of the recall hangs over the head of the judicial Damocles. If even this were true, nothing could be more fatal. A judge must know neither rich nor poor, neither strong nor weak. He must know only law and justice. He must never listen to Bassanio's appeal, "To do a great right, do a little wrong." But the theory is in reality most lamentably false. No man fit to be a judge would, with few exceptions, take office under the recall. In the end the bench would be filled by the weak and the unscrupulous. The weak would make decisions to curry favor and hold votes. The unscrupulous would use their brief opportunity to assure their own fortunes, and that assurance could come only from the rich and the powerful, who would thus control the decisions. For the American court we should substitute the oriental *cadi*, with the bribe giver whispering in his ear. If a criminal happened to belong to some large and powerful organization in whose interest the crime was committed he would have little to fear from a court where a judge subject to the recall presided. We should have courts like those ruled by the *Camorra* in the days of the Neapolitan Bourbons except that the subservience of the judge would be insured by fear of the recall instead of by dread of assassination. The result would be the same and certain criminals would become a privileged class and commit their crimes with impunity.

In one of the noblest passages of his letter to the sheriffs of Bristol Edmund Burke says:

The poorest being that crawls on earth contending to save itself from injustice and oppression is an object respectable in the eyes of God and man.

Without the independent judge those words could never have been written, for before the independent judge alone could the poorest

bring hope to contend against injustice. Judges, of course, are human and therefore err. I know well that there have been one or two great cases where the decision of the highest court traveling beyond its province has been reversed and swept away by the overwhelming force of public opinion and the irresistible current of events. I know only too well that we suffer from the abuse of technicalities, from delays which are often a denial of justice, and that the methods of our criminal law are in many States a disgrace to civilization. But all these delays and abuses and miscarriages of justice are within the reach of Congress and legislatures, and these evils can be remedied by statute whenever public opinion demands a reform. Their continued existence is our own fault. Yet when all is said the errors of the highest courts are few and the abuses and shortcomings to which I have referred can be cured by our own action. In the great mass of business, in the hundreds of trials which go on day by day and year by year, justice is done and the rights of all protected. We may declare with truth that in the courts as we have known them the poor, the weak, the helpless have found protection and sometimes their only defense. A mob might thunder at the gates, money might exert its utmost power, but there in the courtroom the judge could see only the law and justice. The safeguard of the rights and liberties of minorities and individuals, of the weak and above all of the unpopular, as a rule, has been found only in the court. And now it is proposed to undo all this and to make the judges immediately dependent on the will of those upon whom they must pass judgment. If the framers of the Constitution were alive to-day, they would not find a single new condition to affect their faith in an independent judiciary. They would decide now, as they decided then. Are we ready to reverse their judgment and open the door to the flood of evils which will rush into the State as they always have rushed in when in times past the courts were controlled by an outside power?

The destruction of an independent judiciary carries with it everything else, but it only illustrates sharply the general theory pursued by the makers of the Constitution. They established a democracy, and they believed that a democracy would be successful; but they also believed that it could succeed solely through forms and methods which would not make it impossible for the people to carry on their own government. For this reason it was that they provided against hasty action, guarded against passion and excitement, gave ample room for the cooler second thought, and arranged that the popular will should be expressed through representative and deliberative assemblies and the laws administered and interpreted through independent courts. Those who would destroy their work talk continually about trusting the people and obeying the people's will. But this is not what they seek. The statement as they make it is utterly misleading. That for which they really strive is to make the courts and the Congress suddenly and rapidly responsive to the will of a majority of the voters. It matters not that it may be a narrow, an ephemeral, or a fluctuating majority. To that temporary majority, which the next year may be changed to a minority, the Congress and the courts must at once respond. Legislation of the most radical, the most revolutionary character may thus be forced upon the country, not only without popular assent but against the will of the great mass of the people.

The framers of the Constitution made it in the name and for the benefit of the people of the United States; for the entire people, not for any fraction or class of the people. They did not make the Constitution for the voters of the United States. They recognized that the popular will could only be expressed by those who voted and that the expression of the majority must in the end be final. But they restrained and made deliberate the action of the voters by the limitations placed upon the legislative, the executive, and the judicial branches, so that the rights of all the people might be guarded and protected against ill-considered action on the part of those who vote. Those who now seek to alter the fundamental principles of the Constitution start with a confusion of terms and a false proposition. They talk glibly of "the people." But they mean the voters, and the voters are not the people, but a small portion of the people, not more than a fifth or a sixth part, who are endowed by law with the power to express what is to be regarded as the popular will. The legal voters are the representatives and trustees of all the inhabitants of the country, of all those under twenty-one to whom the future belongs, of all the women, of all resident aliens, and of all persons not qualified to vote. They are the instrument, the only practicable instrument, for reaching an expression of the popular will; but they are not the people as a whole, for whom and for whose protection the Constitution was made. It was for the protection of the people that the makers of the Constitution made provisions to assure deliberate movement and to prevent hasty, passionate, or ill-considered action. The purpose of those who would destroy the present Constitution is to remove these safeguards and for the "people" of the Constitution substitute, without check, hindrance, or delay, the will of the voters of the moment. They are blind to the awful peril of turning human nature loose to riot among first principles.

But they do not stop even there. Under the system they propose a small minority of the voters, who are themselves a minority of the people, are to have unlimited power to compel the passage of laws. A small minority will be able and, as the experience of the voluntary referendum shows, will in almost every instance contrive to place laws upon the statute book which the mass of the people really do not desire. A small minority can force the recall of a judge and drive him from the bench. The new system places the actual power in the hands of minorities, generally small, always interested and determined. Instead of government "by the people and for the people" we shall have government by factions, with all the turbulence, disorder, and uncertainty that the rule of factions ever implies. Such a system is a travesty of popular government and the antipodes of true democracy. Under the same conditions of human nature, with no element of decision lacking then that we have now, the framers of the Constitution established the system under which we have flourished and rejected that which it is now proposed to set up and which all experience had shown to be a failure. Their system embodied in the Constitution has proved its efficacy. It has worked well and it has been an extraordinary success. The other, burdened with the failures of centuries, has always trodden the same path which revolves in the well-worn vicious circle from democracy to anarchy, from anarchy to despotism, and then by slow and painful steps back to the high levels of an intelligent freedom and an ordered liberty.

Our ancestors sought to make it as impossible as human ingenuity could devise to drag democracy down by the pretense of giving it a larger scope. We are asked to retrace our steps, adopt what they rejected, take up that which has failed, cast down that which has triumphed, and for government by the people substitute the rule of factions led by the eternal and unwearied champions who in the name of the people seek the promotion which they lack.

Such are the questions which confront us to-day, amazing in their existence under a Constitution with such a history as ours. The evils which it is sought to remedy are all, so far as they actually exist, curable by law. No doubt evils exist; no doubt advance, reform, progress, improvements are always needed as conditions change, but they can all be attained by law. There is no need to destroy the Constitution, to wreck the fundamental principles of democracy and of the Bill of Rights embodied in the first ten amendments, in order to attain to an amelioration of conditions and to a wider and more beneficent social state when statutes can effect all and more than is demanded. It is not necessary to scuttle a noble ship in order to rid her of rats; it is not imperative to burn the strong, well-timbered house which has sheltered successive generations because there is a leak in the roof; it is only a madman who would hurl down in blackened ruin a noble palace, the work and care of centuries, because a stain easily erased may now and then be detected upon the shining whiteness of its marble walls.

All these questions, all these reforms and revolutions so gloriously portrayed to us, it can not be said too often, are very old. Their weakness is not that they are new but that they are timeworn and outworn. The voices which are now crying so shrilly that we must destroy our Constitution and abandon all our principles of government have been heard—

In ancient days by Emperor and clown.

They are as old as human discontent and human impatience and are as ancient as the flattery which has followed sovereign authority from the days of the Pharaohs to our own.

There is a familiar story, which we all heard as children, of the courtiers of Knut, King of England, a mighty warrior and a wise man, not destitute evidently of humor. These courtiers told the King that the tide would not dare to come in against his command and wet his feet. So he bade them place his chair near the edge of the sea and the main came silent, flooding in about him, and you all remember the lesson which the King read to his flatterers. Many kings have come and gone since then, and those who still remain, now for the most part walk in fetters. But the courtier is eternal and unchanged. He fawned on Pharaoh and Cæsar and from their day to our own has always been the worst enemy of those he flattered. He and his fellows contended bitterly in France for the privilege of holding the King's shirt, and when the storm broke which they had done so much to conjure up, with few exceptions they turned like cravens and fled. New courtiers took the vacant places. They called themselves friends of the people, but their character was unaltered. They flattered the mob of the Paris streets, shrieking in the galleries of the convention, with a baseness and a falsehood surpassing even those of their predecessors who had cringed around the throne. Where there

is a sovereign there will be courtiers, and too often the sovereign has listened to the courtiers and turned his back on the loyal friends who were ready to die for him but would not lie to him. Too often has the sovereign forgotten that, in the words of one of the most penetrating and most brilliant of modern English essayists, "a gloomy truth is a better companion through life than a cheerful falsehood." Across the centuries come those dangerous and insidious voices and they sound as loudly now and are as false now as ever. They are always at hand to tell the sovereign that at his feet the tide will cease to ebb and flow, that the laws of nature and economic laws alike will at his bidding turn gently and do his will. And the tides move on and the waves rise and the sovereign who has listened to the false and selfish voices is submerged in the waste of waters, while the courtiers have rushed back to safety and from the heights above are already shouting, "The king is dead! Long live the king!"

I have a deep reverence for the great men who fought the Revolution and made the Constitution but I repeat that I as little think that all wisdom died with them as I do that all wisdom was born yesterday. When they dealt with elemental questions and fundamental principles, the same yesterday, to-day, and forever in human history, I follow them because they have proved their wisdom by their success. I am not ready to say with Donne—

We are scarce our father's shadow cast at noon—

but I am more than ready; I profoundly believe that we should cherish in our heart of hearts the noble and familiar words of the wise son of Sirach:

Let us now praise famous men and our fathers that begat us. The Lord hath wrought great glory by them through his great power from the beginning. Leaders of the people by their counsels and by their knowledge of learning meet for the people; wise and eloquent in their instructions; all these were honored in their generations and were the glory of their times.

There be of them, that have left a name behind them, that their praises might be reported. And some there be which have no memorial; who are perished as though they had never been; and are become as though they had never been born; and their children after them. But these were merciful men whose righteousness hath not been forgotten. With their seed shall continually remain a good inheritance and their children are within the covenant.

Their seed standeth fast and their children for their sakes. Their seed shall remain forever and their glory shall not be blotted out. Their bodies are buried in peace; but their name liveth forevermore. The people will tell of their wisdom and the congregation will show forth their praise.





UNIVERSITY OF CALIFORNIA, LOS ANGELES

THE UNIVERSITY LIBRARY

This book is DUE on the last date stamped below

NOV 25 1946

W

NOV 8 1956

NOV 1958

NOV 1961

NOV 1962

NOV 1963

NOV 1964

NOV 1964

NOV 1965

NOV 1966

NOV 1967

UNIVERSITY of CALIFORNIA
AT
LOS ANGELES
LIBRARY

3 1158 01095

UC SOUTHERN REGIONAL LIBRARY FACILITY



AA 000 811 432 4

